No. 87-1860

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM G. MILLIKEN, et al.,

Appellants,

v.

MICHIGAN ROAD BUILDERS ASSOCIATION INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC. ("MBELDEF") AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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MOTION FOR LEAVE TO FILE BRIEF OF THE MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

Pursuant to Supreme Court Rule 36.1, Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF") respectfully moves for

leave to file the attached brief amicus curiae in this case. Although counsel for appellants and appellees orally consented to the proposed brief's filing, neither provided written consent in the time allowed for filing of the brief.

The Sixth Circuit held a minority business opportunity program enacted by the State of Michigan to be violative of the Fourteenth Amendment to the Constitution. In rejecting Michigan's compelling interest in remedying discrimination through state procurement policies, the Sixth Circuit ignored important governmental purposes served by this program. The opinion has significant implications for federal court review of state and local

government affirmative action programs.

Many of MBELDEF's membership of over 800 minority-owned businesses have benefited from federal, state, and local minority business opportunity programs. Additionally, because MBELDEF provides legal guidance to state and local governments in the adoption of these programs it has a strong interest in their constitutionality.

MBELDEF believes that its perspective may assist the Court in its determination of whether to grant plenary review of the important issues raised by this case.

Respectfully submitted,

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INTEREST OF THE AMICUS CURIAE

Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF") is a nonprofit corporation founded in 1980 by former Maryland Congressman Parren J. Mitchell. The primary purpose of MBELDEF is to promote minority business opportunity programs. MBELDEF is comprised of over 800 minority businesses nationwide, many of which, in their efforts to become successful commercial enterprises, have benefited from federal, state, and local minority business opportunity programs. Additionally, MBELDEF has provided numerous state and local governments with legal guidance in the adoption of such programs

and has participated in significant litigation concerning these programs.[1] MBELDEF therefore has a significant interest in the Court's plenary review of the substantial constitutional issues presented by the invalidation of Michigan's minority business opportunity program.

STATEMENT

The State of Michigan has long recognized the difficulties of minority-owned and women-owned businesses

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[1] MBELDEF has appeared recently as intervenor-appellee before the Sixth Circuit in Tennessee Asphalt Co. v. Farris, No. 87-5588 (6th Cir. argued Mar. 31, 1988), and as amicus curiae in City of Richmond v. J.A. Croson Co., 108 S. Ct. 1010 (1988) (probable jurisdiction noted), and Associated Gen. Contractors, Inc. v. City & County of San Francisco, 813 F.2d 922 (9th Cir. 1987) (petition for rehearing en banc pending).

in securing procurement and construction contracts awarded by various state agencies. Michigan Road Builders Ass'n v. Milliken, 571 F. Supp. 173, 178 (E.D. Mich. 1983), rev'd, 834 F.2d 583 (6th Cir. 1987). In 1971, a state-sponsored study revealed that most of Michigan's twenty-six agencies had no official policy for procurement from minority-owned businesses. Id. at 180. In response, Michigan attempted to induce minority-owned business participation in state contracting opportunities by easing some bonding requirements. See id. at 178-79. Nevertheless, in 1976, "minority businesses obtained only 1% of all State contracts." Id. at 186.

After repeated unsuccessful efforts to increase minority-owned busi-

ness participation in state expenditures, in 1980 Michigan enacted a minority business opportunity bill, Public Act 428, Mich. Comp. Laws Ann. §§ 450.771-450.776 (West Supp. 1988). This Act requires gradual attainment of seven percent participation by minority-owned business enterprises ("MBEs") and five percent participation by women-owned business enterprises ("WBEs").

Appellees subsequently filed suit in United States District Court for the Eastern District of Michigan claiming violations of the Fourteenth Amendment's equal protection clause and their civil rights under 42 U.S.C. §§ 1981, 1983, 2000d, 2000e. The district court squarely rejected these claims and granted appellants' motion

for summary judgment. Milliken, 571 F. Supp. at 190. A divided Sixth Circuit[2] reversed and held that Public Act 428 violated the Fourteenth Amendment. Michigan Road Builders Ass'n v. Milliken, 834 F.2d 583, 595 (6th Cir. 1987).

The Sixth Circuit reasoned that proof of state discrimination is a necessary predicate to the remedial use of racial or gender classifications. Id. at 589, 595. Contrary to the district court's express findings, the Sixth Circuit found that the "Michigan legislature had little, if any, probative evidence before it that

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[2] Judge Lively dissented. Michigan Road Builders Ass'n v. Milliken, 834 F.2d 583, 595-99 (6th Cir. 1987).

would warrant a finding that the State of Michigan had discriminated against MBEs in awarding state contracts . . . ." Id. at 594. On that basis, the Sixth Circuit reversed the district court and remanded for entry of judgment.

SUMMARY OF ARGUMENT

The Sixth Circuit would deprive state and local governments from using minority business opportunity programs to redress the effects of discrimination. In striking down Michigan's Public Act 428, the Sixth Circuit disregarded the important and successful role that these programs play in governmental remedial efforts. Because Public Act 428 is a valid exercise of state authority to meet a

compelling interest the Court should note probable jurisdiction to review the Sixth Circuit's holding otherwise.

Furthermore, the Sixth Circuit's opinion sets an unprecedented and unworkable standard of review for affirmative action programs. Citing Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), the Sixth Circuit reversed the district court, holding that on the legislative record alone, Michigan made no predicate finding that it had previously discriminated against the Act's beneficiaries. This defective review is without basis in the Court's decisions.

The Court's recent note of probable jurisdiction in City of Richmond v. J.A. Croson Co., 108 S. Ct. 1010 (1988), is no bar to review of the

Sixth Circuit's decision. Indeed, Milliken would provide the Court with facts to resolve substantial federal questions in reviewing racial and gender classifications enacted by states and municipalities. Given the diverse application of Wygant, the Court should also note probable jurisdiction in Milliken to provide better guidance to lower courts for review of state and local affirmative action programs.

ARGUMENT

I.

THE SIXTH CIRCUIT DISREGARDED SIGNIFICANT AND COMPELLING GOVERNMENTAL INTERESTS SERVED BY PROGRAMS DESIGNED TO INTEGRATE MBEs AND WBEs INTO THE PUBLIC SECTOR MARKET

It is uncontroverted that the combined effects of past and present, private and public discrimination have denied government contract awards to MBEs. At the national level, empirical tests indicate that discrimination has continued to injure MBEs.[3] Although approximately fifteen percent of the nation's population are minorities, only five percent of the busi-

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[3] See Bates, Minority Business Set-Asides: Theory and Practice, 1 United States Commission On Civil Rights, Selected Affirmative Action Topics in Employment and Business Set-Asides 142, 147 (1985).

nesses are minority-owned.[4] Additionally, MBEs are less profitable, more highly leveraged, and much more likely to be undercapitalized.[5] Moreover,

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[4] See Minority Business Enterprise Legal Defense and Education Fund, Minority Business Enterprises: Programs of State and Local Governments, Academy for State and Local Government 2 (Jan. 1988) (a copy of the report has been lodged with the Clerk of the Court for consideration in City of Richmond v. J.A. Croson Co., No. 87-998, 108 S. Ct. 1010 (1988) (probable jurisdiction noted) and sent to the parties).

[5] In 1944, Gunnar Myrdal observed:

> The Negro businessman, furthermore encounters greater difficulties [than whites] in securing credit. This is particularly due to the marginal position of negro business. It is also partly due to prejudiced opinions among whites concerning the business ability and personal reliability of Negroes. In either case a vicious circle is in operation keeping Negro business down.

G. Myrdal, An American Dilemma 309 (1944).

minority entrepreneurs still earn significantly less than white-male entrepreneurs. Bates, supra note 3, at 149-50. But for the effects of discrimination, it is highly unlikely that free competitive market outcomes would so consistently disfavor minority vendors as compared to others.[6]

Furthermore, because much of the discrimination against MBEs is localized, city and state governments have a particularly strong interest, if not an obligation, in enacting remedial

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[6] Indeed, this Court has recognized the pervasive employment discrimination in the construction industry. "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." United Steelworkers of Am. v. Weber, 443 U.S. 193, 198 n.1 (1979).

programs. For example, a 1974 Michigan-sponsored study "disclosed certain unfounded negative attitudes towards minority contractors by those [state] departments . . . charged with the responsibility of awarding an enormous variety of contracts," Milliken, 571 F. Supp. at 179, even though the officials "had not had any actual experience with minority vendors." Id. at 180. The study concluded that absent formal state action the "negative attitude of State purchasing authorities toward minority vendors would cripple any steps toward achieving equity in the State's purchasing policies." Id. at 181.

Federal programs directed at alleviating the disparity in contracting opportunities have taken a variety

of forms. Section 8(a) of the Small Business Act of 1953 as amended, 15 U.S.C. § 637 (1982), directs federal contract awards to small businesses owned by disadvantaged persons. Fullilove v. Klutznick, 448 U.S. 448, 463-64 (1980) (plurality opinion). The Surface Transportation Assistance Act of 1982 ("STAA"), Pub. L. No. 97-424, 96 Stat. 2098 (codified at 23 U.S.C. § 104 (1983)) and the Public Works Employment Act of 1977 ("PWEA"), Pub. L. No. 95-28, 91 Stat. 116 (codified at 42 U.S.C. § 6701 (1982)), require, subject to certain waivers, that a percentage of appropriated funds be expended with firms owned by socially and economically disadvantaged individuals.

State and local minority business opportunity programs are often modeled after these long-standing federal efforts. See, e.g., N.J. Stat. Ann. §§ 52:32-17, 52:32-30 (West 1986 & Supp. 1988); Wis. Stat. Ann. §§ 16.75(3), 16.87(2), 84.075 (West 1986, 1957 & Supp. 1985). Michigan's Public Act 428 requires that state agencies' contracts with MBEs and WBEs meet percentage goals of each agency's entire annual expenditures. Milliken, 834 F.2d at 584 & n.2. After a four-year start-up period, Public Act 428 requires at least seven percent MBE participation and five percent WBE participation in state expenditures. Id. at 584.

Similar minority business opportunity programs, when measured in

terms of the number of contracts awarded and jobs created, the benefits to program participants and the overall growth in the number of MBEs, have proven effective.[7] These programs

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[7] See, e.g., Senate Committee on Small Business, Survey of the Graduates of the Small Business Administration Section 8(a) Minority Business Development Program (1987); R. Suggs, Recent Changes in Black-Owned Businesses, Joint Center for Political Studies 12-13 (1986) (employment by black-owned heavy construction contractors rose 122.5% and receipts increased 223.7% from 1977 to 1982 attributed, in part, to PWEA); Betts and Giles, Dole Advocates Greater Business Opportunities, Foresees Minority Entrepreneurs Becoming Integral Part of the Transportation Industry, Minority Business Today, July 1986, at 17-18 (Minority Business Development Agency, U.S. Department of Commerce) (disadvantaged business enterprises participation more than tripled from 9,450 contract awards worth $1.03 billion three years prior to STAA's passage to 32,500 awards worth $3.26 billion three years after its passage); Federal Highway Administration, U.S. Department of Transportation, An Assessment of Program Impacts of the Disadvantaged Business Enterprise (DBE)

(Footnote continued)

have aided in the creation and expansion of thousands of MBEs in such

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(Footnote 7 continued from previous page)

Requirement in the Federal-Aid Highway Construction Program 70 (Draft Report, March 1986) (a copy is attached at tab A to the Compendium of Minority Business Opportunity Plan Reports lodged with the Clerk of the Court for consideration in City of Richmond v. J.A. Croson Co., No. 87-998, 108 S. Ct. 1010 (1988) (probable jurisdiction noted) and sent to the parties) (most states experienced a doubling or tripling of disadvantaged business enterprise firms certified for highway construction work from 1983 to 1984); Minority Business Opportunity Program FY 87 Annual Report 1, 6 (a copy is attached at tab B in the Compendium of Minority Business Opportunity Plan Reports lodged with the Clerk of the Court for consideration in City of Richmond v. J.A. Croson Co., No. 87-998, 108 S. Ct. 1010 (1988) (probable jurisdiction noted) and sent to the parties) (Massachusetts procurement from minority-owned firms more than doubled from 1985 to 1987, with minority-owned vendor participation increasing from 368 firms in fiscal year 1984 to 813 firms in fiscal year 1987 and in 1987 state spending with minority-owned firms constituted 10.4% of discretionary services purchased and 9.4% of all discretionary construction work purchased); Executive

(Footnote continued)

fields as wholesaling, general construction, business services, and large scale manufacturing. In Michigan, MBE and WBE participation in state contracting has increased from $8.6 million in 1982 to $41.5 million in 1985.[6]

Michigan's minority business opportunity program is intended to

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(Footnote 7 continued from previous page)
Summary: 1986 Office of Contract Compliance Annual Report (Mar. 31, 1987) (a copy is attached at tab C to the Compendium of Minority Business Opportunity Plan Reports lodged with the Clerk of the Court for consideration in City of Richmond v. J.A. Croson Co., No. 87-998, 108 S. Ct. 1010 (1988) (probable jurisdiction noted) and sent to the parties) (minority-owned business participation exceeded 36% of all Atlanta City contracts).

[6] Michigan Equal Employment and Business Opportunity Council, Status Report 27 (July 1986) (report to Governor and Legislature) (a copy is lodged with the Clerk of the Court and sent to the parties).

redress discriminatory barriers which have impaired opportunities for minorities and women in obtaining government contracts. The Sixth Circuit's decision ignores significant and compelling governmental purposes served by minority business opportunity programs. The important and necessary goals of Public Act 428 and Michigan's fully documented compelling interests mandate plenary review of the Sixth Circuit's decision.

II.

MILLIKEN UNDULY RESTRICTS STATE EFFORTS TO REMEDY DISCRIMINATION

A. Courts Are Not Restricted To the Legislative Record In Reviewing State Affirmative Action Plans

Michigan should be able to "legislate without compiling the kind of

'record' appropriate with respect to judicial or administrative proceedings."[9] Fullilove, 448 U.S. at 478 (plurality opinion); see also Perez v. United States, 402 U.S. 146, 156-57 (1971). Legislators can properly rely on information and expertise acquired in considering and enacting earlier

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[9] As Justice Powell noted in Fullilove, "the creation of national rules for the governance of society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding." 448 U.S. at 502 (Powell, J., concurring). This observation must be equally true when a state creates rules for the governance of its citizens. See Craig v. Boren, 429 U.S. 190, 234 (Rehnquist, J., dissenting) ("Legislatures are not held to any rules of evidence such as those which may govern courts or other administrative bodies . . . .").

legislation.[10] Fullilove, 448 U.S. at 503 (Powell, J., concurring). Similarly, in evaluating Public Act 428, the district court should not be restricted to only the Michigan Legislature's factual record.

Furthermore, the Sixth Circuit's approach is inconsistent with the Court's opinions which require review of all the evidence, not just the

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[10] Moreover, in at least one recent case, the Court has noted that a local government is even "entitled to rely on the experiences" of other local governments. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52 (1986). (a city need not "conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses").

legislative record.[11] In Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), the Court held that the local government must present a "strong basis in evidence" to support its decision to enact an affirmative action program utilizing racial classifications. Id. at 277 (plurality opinion). The Sixth Circuit, however, misunderstood Wygant to further require that the "evidence" must be found solely in the "evidentiary fac-

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[11] See Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266-68 (1977) (requiring courts, in equal protection cases, to review all "circumstantial and direct evidence . . . as may be available"); see also City of Richmond v. United States, 422 U.S. 358, 373-75 (1975) (requiring the lower court in a Voting Rights Act case to review all data, not only that existing prior to the legislative action).

tual record" created by the legislature. Milliken, 834 F.2d at 590 (citing J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1360 (4th Cir. 1987), jur. noted, 108 S. Ct. 1010 (1988)) (emphasis added). This amounts to an impermissible judicial imposition of formal fact-finding on the Michigan Legislature.

The Sixth Circuit's approach is devastating to all programs designed to aid MBEs. Requisite legislative factual records would significantly strain many states and localities, which typically operate on a smaller and less formal scale than Congress. See, e.g., May v. Cooperman, 572 F. Supp. 1561, 1564 (D.N.J. 1983) (noting that the New Jersey legislature does not maintain records of hearings and

debates), aff'd, 780 F.2d 240 (3d Cir. 1985). The resulting Pandora's box is of such magnitude that many local governmental actions would be unsupportable absent detailed fact-finding.

B. State and Local Affirmative Action Does Not Require Governmental Mea Culpa

The Sixth Circuit also erred in requiring that Michigan make "a finding . . . that it has in the past discriminated against those classes it now favors." Milliken, 834 F.2d at 589. This requirement has no basis in law and is inconsistent with Fullilove and Wygant.

In Fullilove the Court held the Public Works Employment Act's minority business opportunity program to be constitutional as a legitimate effort

to remove "barriers to competitive access which had their roots in . . . discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct." Fullilove, 448 U.S. at 478 (plurality opinion) (emphasis added). Indeed, in Fullilove, there was no evidence that the federal government itself had engaged in racial discrimination in its disbursement of federal contracting funds. Id. at 528 (Stewart, J., dissenting).

Nor does Wygant impose any requirement that a state find itself guilty of previous discrimination before passing affirmative action legislation. In Wygant, the Court held as unconstitutional an affirmative action plan that ignored senior-

ity in requiring lay off of others before minorities. Wygant, 476 U.S. at 279-84 (plurality opinion). At most, Wygant requires that governments have "sufficient evidence to justify the conclusion that there has been prior discrimination," id. at 277 (plurality opinion) (emphasis added) or "a firm basis for believing that remedial action is required." Id. at 286 (O'Connor, J., concurring).[12]

The trial court properly found that the Michigan legislature had a sufficient basis to believe that reme-

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[12] Indeed, Justice O'Connor carefully explained that specific contemporaneous findings of discrimination are not necessary because that requirement would inhibit state and local governments from voluntarily meeting their civil rights obligations. Wygant, 476 U.S. at 289-91 (O'Connor, J., concurring).

dial action was necessary to correct past and present discrimination. Milliken, 571 F. Supp. at 187. Contrary to the Sixth Circuit's decision, Michigan's compelling interest was therefore demonstrated. The Sixth Circuit's further requirement that Michigan contemporaneously find that it had discriminated against minorities is unsupportable and should be reviewed.[13]

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[13] Furthermore, even if Wygant required that a State find itself guilty of discrimination, the Michigan program passes muster. The State presented evidence that it may have indeed discriminated against MBEs and WBEs. See Milliken, 571 F. Supp. at 178-85. Nevertheless, the Sixth Circuit erroneously disregarded this strong evidence in reversing. See Milliken, 834 F.2d at 590 n.7.

C. The Sixth Circuit Ignored the Proper Standard of Review and Misapplied the Burden of Proof

In fact, the Sixth Circuit simply substituted its own view of the evidence without establishing that the lower court's findings were clearly erroneous.[14] The district court found that "there was sufficient evidence before the Legislature to make a finding of past intentional discrimina-

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[14] "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985). Moreover, if factual findings of a district court are inadequate a court of appeals should not find fact on its own, but rather should remand for further fact finding. Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986).

tion." Milliken, 571 F. Supp. at 187. This finding of intentional discrimination is a finding of fact which should not have been disturbed by the Sixth Circuit unless it is clearly erroneous. See Anderson v. Bessemer City, 470 U.S. 564, 573 (1985).

Moreover, when the district court finds a firm basis for believing that remedial action was necessary, "[t]he ultimate burden remains with the [plaintiff] to demonstrate the unconstitutionality of an affirmative action program." Wygant, 476 U.S. at 277-78 (plurality opinion). Nevertheless, the Sixth Circuit placed the burden of proof squarely on appellants. See 834 F.2d at 590. Thus, in reworking the district court's analysis, the Sixth Circuit erred in fail-

ing to shift the burden of proof to the appellees.

III.

THIS CASE COMPLEMENTS THE COURT'S CONSIDERATION OF CITY OF RICHMOND v. J.A. CROSON CO.

This Court has noted probable jurisdiction in City of Richmond v. J.A. Croson Co., 108 S. Ct. 1010 (1988), in which the Fourth Circuit ruled that a City of Richmond affirmative action program, similar in many respects to Public Act 428, was unconstitutional. J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1362 (4th Cir. 1987), jur. noted, 108 S. Ct. 1010 (1988). The Fourth Circuit construed Wygant to require Richmond to find that it had discriminated against favored groups as a predicate

to the constitutionality of its affirmative action program. Croson, 822 F.2d at 1358.

Although both cases involve the similar core issues, Milliken raises substantial federal questions not presented by Croson.[15] First, the Michigan case concerns the constitutionality of a state-enacted program

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[15] This Court has ordered consecutive arguments in cases which presented complementary issues in order to clarify the law and give better guidance to lower courts and governmental bodies. For example, in Brown v. Board of Education, 345 U.S. 972 (1953) this Court ordered five sets of parties to argue their similar constitutional issues together; see also Miranda v. Arizona, 384 U.S. 436 (1966) (resolving four separate cases at once in order to give lower courts and police agencies greater guidance). This procedure has allowed this Court to resolve and clarify important questions that could only be partially answered by deciding any one of the cases by itself.

as opposed to a municipal ordinance. In Associated General Contactors, Inc. v. City & County of San Francisco, 813 F.2d 922 (9th Cir. 1987) (petition for rehearing en banc pending), another case concerning the constitutionality of a MBE and WBE opportunity program, the Ninth Circuit distinguished between city and state authority to enact legislation using racial classifications. Id. at 929-30. Thus, the Court should resolve whether Michigan's legislation, in addition to Richmond's ordinance, is constitutional under the Fourteenth Amendment.

Additionally, Croson concerned a program designed to aid only MBEs. Croson, 822 F.2d at 1356. Michigan's program assists both MBEs and WBEs. Because gender-based governmental

preferences may receive less stringent judicial review than those based on race, see Personnel Adm'r v. Feeney, 442 U.S. 256, 272-73 (1979), Michigan's program requires analysis not implicated in Croson.[16] The bundled affirmative action goals of Public Act 428, aimed at both racial and gender discrimination, should lead this Court to consider the Michigan program.

Finally, in Croson, the City of Richmond adopted its ordinance after a five-hour public hearing. Croson, 822 F.2d at 1358. Michigan, however, adopted its program after ten years of

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[16] Indeed, in Associated General Contractors, this difference in scrutiny led the Ninth Circuit to invalidate the MBE preference but uphold preferences for WBEs. 813 F.2d at 944.

efforts to address the difficulties faced by MBEs and WBEs in winning government contracts. Milliken, 571 F. Supp. at 178-185. This contrast between factual records may aid the Court in defining a standard of review for affirmative action efforts.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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